PRESSURES ON FEDERAL REGULATORY COMMISSIONS

by

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THE INQUIRY into operations of federal regulatory commissions and the conduct of their members, opened on Jan. 27 by the House Subcommittee on Legislative Oversight, has evoked general interest in a sector of government which ordinarily escapes close public attention. The investigation, which is likely to extend beyond the present session of Congress, has been concerned so far chiefly with the affairs of the Federal Communications Commission. Five similar agencies—the Civil Aeronautics Board, Federal Power Commission, Federal Trade Commission, Interstate Commerce Commission, and Securities and Exchange Commission—are expected to come under the subcommittee's scrutiny in due course. The "Big Six" regulatory commissions form collectively what has been called "a headless 'fourth branch' of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers." [1]

Preparations for the present probe got under way many months before the hearings began at the end of January. A House resolution of Feb. 5, 1957, authorized the Committee on Interstate and Foreign Commerce to carry on broad inquiries in the field of the regulatory commissions. Before the resolution was adopted, Speaker Sam Rayburn (D-Texas) took the floor and urged the committee to set up a subcommittee "to go into the administration of each and every one" of the laws governing the regulatory commissions "to see whether or not the law as we intended it is being carried out or whether a great many of these laws are being repealed or revamped by those who administer them." The Subcommittee on Legislative Oversight, subsequently named by Chairman Oren Harris of the Commerce Committee, adopted Rayburn's language almost without change as a statement of the purpose of its inquiry.

Disagreement between Bernard Schwartz, New York

[1] *Report of the President's Committee on Administrative Management* (1937), p. 39.

University law professor who was appointed chief counsel for the inquiry on Aug. 1, and some subcommittee members over the approach to take in the investigation neared a climax at a closed session of the group on Jan. 8. Schwartz had prepared a 28-page memorandum to serve as guide to an exhaustive probe of the Federal Communications Commission. The bulk of the memorandum was devoted to inconsistencies in the application of standards employed by F.C.C. in granting television licenses. Three pages dealt with specific charges that unnamed F.C.C. commissioners had accepted favors from the television industry. Over Schwartz' strong objections, the subcommittee voted to put off this line of inquiry and start the hearings with a "general survey" of the Big Six.

After contents of the Schwartz memorandum had "leaked" to the press, Commerce Committee Chairman Harris reversed the subcommittee's decision and pledged prompt hearings on the charges of official misconduct. During the first two weeks of hearings the inquiry suffered from an exchange of charges and countercharges between Schwartz and subcommittee members. Finally, on Feb. 10 a bipartisan majority voted to dismiss Schwartz as chief counsel and staff director. Rep. Morgan M. Moulder (D-Mo.) thereupon resigned as subcommittee chairman and Rep. Harris assumed the chairmanship.

Commenting on the sensation produced by Schwartz' activity, William S. Fairfield wrote in *The Reporter* on March 20: "Some claim that the young law professor destroyed by his own arrogance and impatience what could have been one of the most important legislative investigations since Charles Evans Hughes studied the insurance companies half a century ago. Others insist that a really honest and exhaustive examination of the regulatory agencies could never have gotten even a start unless Schwartz had acted precisely as he did."

Criticism of Conduct of Certain Commissioners

The initial phase of the public inquiry culminated, March 3, in the resignation of F.C.C. Commissioner Richard A. Mack. Mack had admitted to the subcommittee that, since appointment to the commission in 1955, he had accepted loans totaling $2,650 as well as other favors from Thurman A. Whiteside, Miami lawyer and close personal friend, who had contacted him in behalf of an application by a sub-

sidiary of National Airlines for a Miami television channel. Subcommittee members agreed that Mack's acceptance of loans and favors from Whiteside, whether or not illegal under the circumstances, was certainly improper.[2]

Sen. Wayne D. Morse (D-Ore.) pointed up in the Senate on Feb. 21 another possible source of biased judgment in the regulatory agencies. Citing the Interstate Commerce Commission to illustrate a problem "that ranges across the whole gamut of federal . . . agencies," Morse said:

> The I.C.C. affects shippers and travelers across the nation to the tune of tens of millions of dollars a year. The Senate should know whether commissioners and general counsels of the I.C.C. look upon their positions as public trusts or merely the most likely means of obtaining lucrative employment with the carriers the commission is supposed to regulate.

Morse had noted that Commissioner Owen Clarke had announced his resignation from the I.C.C. last December, had continued to serve as its chairman until mid-January, and had become a vice president of the Chesapeake & Ohio R.R. in February.

The Subcommittee on Investigations of the Senate Committee on Government Operations held hearings last summer on alleged leaks from the Civil Aeronautics Board and said in a report on Feb. 3:

> There were leaks from within the C.A.B. concerning the secret vote of Aug. 2, 1956, which awarded the New York-Florida route to Northeast Airlines. . . . Leaks of information of a secret nature have been promiscuous at the C.A.B. for many years. . . . The Civil Aeronautics Board has a regulation prohibiting such leaks; however, it carries only an administrative penalty of dismissal from the agency.

Much of the recent criticism of regulatory agencies has been directed against commission members only insofar as they have allegedly submitted to outside pressures. F.C.C. Chairman John C. Doerfer appeared before the Subcommittee on Legislative Oversight early in February to answer charges that he had habitually "fraternized" with officers of broadcasting companies who had, or would have, cases before the F.C.C., and that he had accepted payments from

[2] Chairman Harris said on Feb. 25 that Mack had violated a provision of law which bars F.C.C. members from having any financial interest in companies involved in any way in radio communications. The subcommittee had developed testimony that Mack owned one-sixth of the stock—a gift from Whiteside—in a company that insures the Miami television station owned by Public Service Television, the National Airlines subsidiary.

them and let them pay hotel and transportation expenses. Doerfer admitted having accepted $575 as a fee for a speech delivered at a broadcasters' dinner in Oklahoma City in 1954. However, he cited a 1952 law authorizing F.C.C. commissioners to take "reasonable" honorariums.[3] He acknowledged also that he had allowed broadcasting companies to pay a part of his expenses while at the same time accepting *per diem* reimbursement from the government. Similar testimony was given late in March by F.C.C. Commissioner Rosel H. Hyde and other commissioners. When Robert W. Lishman, who succeeded Schwartz as subcommittee counsel, quoted Controller General Joseph Campbell to the effect that federal officials were prohibited by statute from accepting travel expenses from both the government and private industry, Hyde said that he and others had relied on a contrary ruling by the Controller General's office in 1954.

Legislative and Executive Pressure on Agencies

Recent hearings have confirmed the general belief that members of regulatory commissions do not enjoy the insulation from outside pressures that protects judges in a court of law. The Miami television inquiry disclosed that several U.S. senators had urged the F.C.C., while the case was still pending, to give careful consideration to the bid of the unsuccessful applicant, A. Frank Katzentine. Rep. Charles A. Wolverton (R-N.J.), a subcommittee member who has been among those most critical of influence peddling, admitted on March 20 that he had interceded in 1953 in behalf of a constituent who sought a television license. Chairman Doerfer told the subcommittee that "since July 1957, I have had over 900 letters from members of Congress."

Off-the-record intercession has apparently been practiced also by members of the Executive Branch. Rep. Harris read into the subcommittee record on Feb. 13 a letter purportedly written by Sherman Adams, Assistant to the President, to Murray M. Chotiner, California lawyer hired in 1953 by the non-scheduled North American Airlines whose continuance in business was threatened by a Civil Aero-

[3] This law applies only to members of F.C.C. The legislative history of the statute indicates that it was drawn to cover the case of George Sterling, chief engineer of F.C.C., who was appointed a commissioner in 1952. Sterling had written a widely used book on broadcast engineering, and it was feared he would have to sacrifice his royalties to become a commissioner. The intent of Congress seems to have been to permit acceptance of royalties or honorariums for important technical works that required extensive research and expert knowledge, not for speeches at industry dinners.

nautics Board order. The letter said the writer had gone over the case carefully with the acting chairman of C.A.B., who had pointed out that appeal of the agency's decision to the federal courts "might delay the operation of the order . . . for as much as two years." [4]

The then chairman of the Securities and Exchange Commission, J. Sinclair Armstrong, told a Senate subcommittee on June 11, 1955, that Adams had telephoned him to ask that S.E.C. defer scheduled hearings because certain government attorneys were out of town. The dual role of Adolphe H. Wenzell, New York investment banker, in the Dixon-Yates controversy was to come up in the S.E.C. hearings at about the time the House was to vote on a $6.5 million appropriation for a power line to connect the proposed Dixon-Yates generating plant with the T.V.A. distributing system. The S.E.C. hearing was postponed.

The important point to consider in regard to intercession with regulatory commissions by persons in public life, it has been pointed out, is whether it is proper for a representative of one party in a case to have access, unknown to the other party or parties, to those who will decide the case. Some of the commissions have adopted strong rules to ward off outside pressures, but the House investigation has indicated that they have not been firmly enforced.

To what extent the commissions guard their independence while performing duties of a legislative, as distinct from a judicial, nature also has been brought into question. At the close of Senate Commerce Committee hearings in 1957 on the renomination of Jerome K. Kuykendall to the Federal Power Commission, Sens. Warren G. Magnuson (D-Wash.) and John C. Pastore (D-R.I.) filed a minority report. Refering to Kuykendall's appearance at House hearings on the natural gas bill, the senators said:

> Only when he was repeatedly pressed . . . did Mr. Kuykendall disclose his collaboration with gas industry representatives in the drafting of legislation easing federal control of natural gas producers, at the direction of the White House, in the spring of 1956. His testimony revealed that he pursued a path of secrecy in this regard at specific White House direction.

"Manifestly, such legislation involves basic policy issues which only the Congress has a right and duty to create.

[4] A C.A.B. regulation declares it "improper that there be any private communication on the merits of the case to a member of the board or its staff or to the examiner in the case by any person, either in private or in public life, unless provided by law."

Here, an executive request became a command of an independent agency chairman."

Objections to Long Delays in Commission Action

The Federal Power Commission is among agencies that have come under criticism for failure to act or for needless delay in acting on business before them. A Supreme Court decision on June 7, 1954, overturned then existing regulatory practices with respect to natural gas by holding that F.P.C. had authority to control prices charged by producers for gas sold in interstate commerce for subsequent resale.[5] The commission, however, has been reluctant to tackle the task of overseeing producer prices. Chairman Kuykendall on several occasions has told Congress that a majority of F.P.C. members favor exempting "producers and gatherers" from provisions of the 1938 law, as proposed in the natural gas bill. Testifying on June 19, 1957, in opposition to the reappointment of Kuykendall, Rep. Charles A. Vanik (D-Ohio) said:

> To date, the Federal Power Commission . . . has established no procedures or rules for considering [reasonable prices for natural gas at the wellhead]. Each case is theoretically heard on its own merits. In the billions of pages of testimony and evidence which have been submitted, no criteria for evaluation or rule-making have been established. The [F.P.C.] has a duty to operate under the written law as interpreted by the courts.

An almost universal criticism of the regulatory commissions is that they have become, if anything, more sluggish than the courts. The I.C.C. has long been criticized by railroads for protracted delay in dealing with petitions for increases in freight rates. A Federal Trade Commission case passed on by the Supreme Court this term was in the works for 17 years. F.C.C. has taken as long as five years to decide between competing applicants for a television channel. In the recent Miami case, 18 months elapsed between oral argument before the commission and the commission's decision; before that, the case had been under study for two years.[6]

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[5] Phillips Petroleum Co. *v.* Wisconsin (347 U.S. 672). F.P.C. had previously interpreted the Natural Gas Act of 1938 as giving it authority to control only interstate transmission of natural gas and prices charged by pipeline companies for gas sold to local utilities and other customers. See "Natural Gas Regulation," *E.R.R.*, 1955 Vol. I, pp. 299-301.

[6] Commissioner Hyde told the House subcommittee, Mar. 28, that F.C.C.'s work was impeded by protracted and voluminous procedures required by law; the record in the Miami case filled 22 volumes. The Miami station went on the air in August 1957, but final settlement threatened to be long delayed. The losing applicant appealed to the courts, and F.C.C. petitioned on March 13 for return of the case to its jurisdiction.

Chairman Harris has indicated that the purpose of the Subcommittee on Legislative Oversight in looking into the Miami case was not to expose Richard A. Mack's personal finances, but to learn why a four-member commission majority, which included Mack, had arrived at a decision contrary to that recommended by the F.C.C. examiner. Almost a year ago, on May 27, 1957, Rep. John A. Dingell (D-Mich.) sharply attacked an F.C.C. decision made a month earlier by a majority composed of the same four commissioners.[7] Dingell asserted in the House that "The F.C.C. has adopted a new philosophy of regulation—to make decisions in behalf of those who seem to have the most powerful political muscles." Complaint has been raised that F.C.C. has been settling contests for television licenses on no discernibly rational basis. "Standards are announced only to be ignored, ingeniously explained away, or so occasionally applied that their very application seems a mockery of justice." [8]

Evolution of Regulation by Commission

INVESTIGATION of the independent regulatory agencies has turned attention to the enormous powers which these bodies exercise over American business. Although a varied group with a varied history, each of the Big Six has been delegated broad authority by Congress to regulate an entire industry, or set of industries, in the public interest. The Interstate Commerce Commission, first of the major regulatory bodies, has power over virtually every phase of interstate transportation other than by air. It fixes rates and fares for rail, highway, and water common carriers, makes safety regulations for all carriers, decides which truck lines may operate between which cities and what kind of cargo they may carry, and passes on consolidations and mergers.

Congress used the I.C.C., established in 1887, as the basic model for other commissions. Each is bi-partisan, has five or seven members (except the I.C.C. which has eleven) appointed by the President, subject to Senate confirmation,

[7] That decision awarded the license for a Boston television channel to the *Boston Herald-Traveler*, which an F.C.C. examiner had ranked in a tie for third-place consideration.

[8] Louis L. Jaffe, "The Scandal in TV Licensing," *Harper's*, September 1957, p. 84.

for terms of five or seven years. Each is theoretically free from control by the voters, the President, the courts, or Congress. Decisions of an adjudicatory type can be appealed to the federal courts, but judges are not supposed to consider the merits of a case unless the agency's decision has been clearly arbitrary.

Members of the Legislative Branch have made it plain periodically that the power of Congress has been delegated, not abdicated, and that in the last analysis the commissions are "creatures of Congress." The classic view of the commissions held by federal legislators was expressed 27 years ago by the man chiefly responsible for the current House inquiry, Speaker Sam Rayburn:

> Far from undermining the constitutional authority of Congress, delegation of authority to administrative agencies is one of the surest safeguards to effective legislative action. It is a procedure which conserves the vital power of Congress for vital matters . . . [A commission] does not perform any act that Congress has not the power and authority to perform itself. . . . Congress . . . delegated responsibility to a commission of . . . trained experts to work out the details for them.[9]

In broad terms, each regulatory agency has quasi-legislative and quasi-judicial functions. When the Civil Aeronautics Board promulgates a rule asserting its primary jurisdiction over air space for both civil and military purposes, as it did recently, it is exercising its quasi-legislative (or rule-making) power. When it decides which of several commercial airlines shall be awarded a specific airline route, it is exercising quasi-judicial (or adjudicatory) power. Similarly, the F.C.C. is making rules when it sets up criteria for evaluating competing claims for a TV license, adjudicating when it awards a license. The Administrative Procedure Act of 1946 binds the agencies to follow strict regulations at the adjudicative stage as to notice, hearings, procedures, evidence, oral argument, and formal judicial decision. However, most of this takes place before a hearing examiner, not the commissioners themselves; hence there is a separation of the "trial" from the judges.

Present concern over the commissions has focused chiefly on the extent to which outside influence has operated to control or affect decisions late in the adjudicatory stage—after the examiner has made his recommendations and

[9] Quoted by Harver H. Bernstein, *Regulating Business by Independent Commission* (1955), p. 67.

while a matter is pending before the commissioners. F.C.C. and C.A.B. are more inviting targets for outside pressure than the other commissions now under investigation. The prizes they are able to award in specific judgments—TV licenses and airline routes—are worth millions to the successful applicants; not long ago a television license changed hands for more than nine million dollars. On the other hand, the Federal Trade Commission is perhaps the least vulnerable of the Big Six to outside pressure; rarely in recent years has its work involved single actions in which a decision of great monetary consequence was at stake.

Commissions as Expert and Independent Bodies

Commissions have been appraised in the past from various points of view, but the basic arguments for and against this regulatory system have remained essentially unchanged for 75 years; only emphasis has fluctuated. Supporters of the proposed Interstate Commerce Commission asserted in the hearings and debates which preceded its creation in 1887 that:

> A commission would be able to regulate the railroad industry with flexibility and expertness. Complex railroad problems could be handled more effectively by this means than through rigid legislative and judicial processes.
>
> An expert and continuing body would be of great assistance to Congress in formulating regulatory policy.
>
> A commission would defend the interests of public and shippers and "protect the rights of those whose resources left them otherwise defenseless."
>
> A commission would serve as a tribunal to adjust the conflicting interests of different railroads and save them from the effects of cutthroat competition.[10]

Congress never has seen fit to alter the basic character of the regulatory commission. The commission movement has been characterized by a faith in experts and in rational solution of controversial regulatory problems. Creation of commissions has been advocated as a way to insulate the process of governmental regulation of business from partisan political forces. But it has not always done so.

Presidential Influence on Federal Commissions

It has been asserted that every President of the United States from Wilson on has tried in one way or another to influence commission activity and has succeeded in doing so.

[10] Robert E. Cushman, *The Independent Regulatory Commissions* (1941), pp. 45-61.

> Presidents Harding and Coolidge made plain on repeated occasions that they believed presidential domination of certain of the independent agencies essential. . . . President Hoover made public statements indicating how he thought the Interstate Commerce Commission ought to exercise certain of its powers, and the commission somewhat reluctantly yielded.[11]

President Roosevelt obtained the resignation of Hoover's chairman of the Federal Power Commission and added two appointees of his own. Roosevelt, moreover, aided by the change wrought by the depression in the attitude of the public toward the role of government in economic affairs, promoted a wide expansion of the regulatory structure. Two of the Big Six commissions were created during the depression decade—S.E.C. in 1934 and C.A.B. in 1938—and F.C.C. was organized in 1934 in succession to the Federal Radio Commission, which had been established seven years earlier.

Devices used by the Executive Branch to exert influence over the commissions have included, in addition to the power of appointment, conferences on broad regulatory policy with commission chairmen, Budget Bureau action on appropriation requests or apportionment of available funds, and Justice Department action or inaction against violators of commission regulations.

By and large, the history of regulatory commissions during the past four decades suggests failure to develop a strong tradition of independence from politics and outside pressures. The notion that in performance of its duties a commission is free to "work out the details" of congressional intent has not been substantially borne out. Meanwhile, the regulated industries, while consistently opposing establishment of more stringent controls, have become in general stout defenders of the commission system of government regulation.

Responsibility for Faults and Failures

CONGRESS can be held partly responsible for deficiencies found in the commissions. Laws enacted piecemeal over the years to discourage unethical practices are not compre-

[11] *Ibid.*, pp. 681-682.

hensive or explicit enough to ward off effectively the pressures which beset commissioners.

There are now on the statute books three kinds of laws applying to members of regulatory agencies which are designed to prevent dishonest or unfair conduct. The most stringent is Chapter 11 of the U.S. Criminal Code, whose provisions make it unlawful to give, ask or accept a bribe. Members and employees of the regulatory commissions are subject also to those provisions of the Criminal Code aimed to prevent conflicts between personal interest and public duty.[12] Conflict-of-interest provisions are incorporated likewise in the statutes which set forth the responsibilities and duties of each agency. The broad prohibition contained in the Federal Power Act is typical:

> No person in the employ of or holding any official relation to any licensee or to any person, firm, association, or corporation engaged in the generation, transmission, distribution, or sale of power, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold the office of commissioner. Said commissioners shall not engage in any other business, vocation, or employment.[13]

Shortcomings of the laws affecting ethics in government have long been recognized. It has been noted, for example, that enforcement of criminal provisions against bribery is made difficult by the fact that conviction depends on proof of intent to influence or alter official action—and intent is difficult to prove at law. Also, only a shadowy line may exist between outright bribery and mere good-fellowship. The general conflict-of-interest laws, it has been observed, are framed in narrow language and have been weakened by many statutory exceptions.

The broadly phrased prohibitions of the organic acts of the agencies point up a striking characteristic of present restraints. Except in the case of bribery laws, Congress has not made it unlawful for persons in private or public life to try to influence members of regulatory agencies. The burden of good conduct rests almost entirely upon the commissioners. It has been contended that this one-sided approach to maintenance of integrity is unrealistic if not unfair. Restrictions imposed on influence peddlers by the

[12] For a summary of existing bribery and conflict-of-interest laws, see "Ethics in Government," *E.R.R.*, 1951 Vol. II, pp. 834-839.

[13] S.E.C. commissioners are allowed to hold stock in industries whose securities come under their jurisdiction, but "No commissioner shall . . . participate, directly or indirectly, in any stock market operations or transactions of a character subject to regulation by the commission."

commissions themselves have not compensated for failure of Congress to protect its "creatures" by making it a criminal offense to attempt to sway their judgments.

Laxity of Congress in Setting Up Agency Guides

Congress has been held partly to blame for failure of commissions to adopt firm standards or champion new technology. Although this charge pertains to most of the principal regulatory agencies, recent events have pointed up its validity with regard to the F.C.C. in particular. When Congress in 1927 conferred on the Federal Radio Commission the power to limit the number of broadcasters, it laid down no standards to guide that agency in choosing among rival applicants or in regulating the performance of licensees. The statute simply provided that a license should be granted if "public convenience, interest, and necessity will be served thereby," and that the commission should "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

> Perhaps Congress failed to see the difficult problems that were to arise in licensing and regulating broadcasting—a not unlikely assumption since the legislation was first adopted in 1927 and re-enacted in 1934. But the problems have since become glaringly acute, and though Congress has unceasingly criticized and investigated the commission, it has not in all these years made a single contribution to policy, except through threats of committees and pressure exerted over the telephone.[14]

Recently, after years of study, F.C.C. decided to allow a trial run of pay-as-you-see television. Often accused of "standing pat" and "bowing to the desires of the networks," the commission in this instance made a decision which the networks strongly opposed. House and Senate Commerce committees took action in February which in effect called on F.C.C. to postpone the trial of "pay TV" until Congress had declared itself on the issue. The commission complied.

A broad delegation of power to a regulatory agency is not unusual. It is up to the agency itself, not only to fill in the details, but also to pioneer in new developments. This was conceded by F.C.C. Chairman Doerfer last autumn:

> With respect to subscription television, I know that many members of the broadcast industry would like us to kick that up into the congressional section of the stands. However, much as Con-

[14] Louis L. Jaffe, "The Scandal in TV Licensing," *Harper's*, September 1957, p. 78.

gress is welcome to the ball, I am fearful we would be remiss in our duty if we delayed a decision much longer merely upon such grounds.[15]

Regardless of the merits of "pay-TV," it is a fact that it took the commission seven years to decide that it deserved a carefully controlled trial. "In its first really important [legislative judgment] in years, the F.C.C. has shown that it can be circumvented easily by appeal directly to the appropriate congressional committees." [16]

Failure of Commissions to Stick to the Rules

Hesitation and timidity in making of rules have sometimes been followed by commission disregard of the rules once they have been made. It is generally agreed that criteria which F.C.C. has developed for deciding which of competing applicants should be awarded a television license are basically relevant and sound.[17] At the same time, they are capable of infinite manipulation and sometimes seem to have been used to justify results otherwise arrived at.

Critics of F.C.C. have noted that commissioners almost never read the huge record worked up by an examiner and that they do not write their own opinions. They have pointed to an apparent tendency to subordinate other criteria—such as local ownership and the rule which works against applicants who already control a mass communication medium—to that of experience. If true, this would give a large head start in any competitive case to the applicant who already controlled other radio or television stations.

Most of the Big Six commissions have adopted rules elaborating on the conflict-of-interest provisions included in their basic statutes. Only F.C.C. has failed to add to the good conduct requirements formulated by Congress. Of possibly greater significance, F.C.C. is one of three commissions under investigation which has not set up prohibitions against the exertion of outside pressure on commissioners while a case is pending; the others which have not taken protective action of this type are S.E.C.[18]

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[15] Address before Radio and Television Executive Society, New York City. Reprinted in *Commercial and Financial Chronicle*, Oct. 17, 1957.

[16] Jack Gould, *New York Times*, March 2, 1958.

[17] The criteria are local ownership; past performance; integration of ownership and management; broadcast experience; proposed programming and policies; and diversification of control of the media of mass communications.

[18] S.E.C. has a proposed code of ethics under consideration.

and F.P.C. On the other hand, F.T.C. and C.A.B. have adopted anti-pressure regulations similar to those found in Rule 8 of the Canons of Ethics of the Interstate Commerce Commission:

> To the extent that [the commission] acts in a quasi-judicial capacity, it is grossly improper for litigants, directly or through any counsel or representative, to communicate privately with a commissioner, examiner, or other representative of the commission about a pending cause, or to argue privately the merits thereof in the absence of their adversaries or without notice to them.

Although no criminal penalties attach to violation of these ethical canons, threat of public exposure can be a powerful deterrent.

Character of Appointments to the Commissions

In his "Letter From Washington" in the March 1 issue of *The New Yorker*, Richard H. Rovere wrote of the commissioners:

> In the thirties, the great age of the commissions, the newspapers and magazines kept the public advised of what was being said and thought and done in the offices of these men. For the past ten or twelve years this has not been the case. . . . Chosen from the ranks of the obscure and the politically necessitous, the commissioners—or most of them, anyway—remain in relative obscurity and are rewarded with salaries that compare most unfavorably with those of the businessmen who seek their good opinion.

Failure to staff the agencies with persons of distinction is one reason why the commissions have faded from public view; this, in turn, may explain why brokers of influence have gone largely unnoticed in their efforts to shape commission action. It may explain also why off-the-record intercession by members of Congress has increased. Rovere observed that "For at least a decade—in the Truman administration as well as in the Eisenhower administration—the regulatory agencies have been regarded as more or less patronage bureaus, upon which any politician from any party is free to exert all the pressure he can muster." Putting men of only moderate stature on the commissions naturally helps to open the way to successful application of pressure.

On the other hand, pressure, especially from high places, may have a sort of corroding effect on those subjected to it. James M. Landis, chairman of C.A.B. from 1946 to 1948, recently recounted instances of White House intervention

in cases before that agency. The President is empowered by law to review C.A.B. actions affecting international air commerce, but Landis pointed out that "It is obvious that if the White House aides involve themselves as deeply as they have done in international air routes, they will not hesitate to intervene in national air routes even though the White House lacks statutory authority to do so." Deploring the waging of contests between competing carriers "in the darkness of White House secrecy," Landis said: "What the introduction of such a procedure has meant to the morale of so-called independent commissioners is not difficult to guess; what it has meant to the processes of orderly adjudication is written clearly on the record." [19]

Mixing of Legislative and Judicial Functions

Failure of the regulatory commissions always to operate independently, with the public interest foremost in view, may be blamed in large part on the commission system itself. The legislative and judicial functions assigned to each agency must be performed in different settings, and they require different approaches to fact-finding. Members of F.C.C. have said that 90 per cent of a commissioner's work is legislative and that he has to mix with persons in the industry to do that part of his job well. Civil Aeronautics Board Chairman James R. Durfee told a subcommittee of the Senate Judiciary Committee on March 5, 1958, that:

> [When performing a quasi-legislative function], the Board and its members should be free to discuss the merits of a pending rule designed to promote and develop aviation with anyone interested . . . without formal public hearing, just as an individual member of Congress can, with complete propriety, discuss pending legislation with anyone interested at any time. Any general restriction on this freedom . . . would defeat its own purpose.

Application of strict codes of ethics to the adjudicatory proceedings of commissions cannot erase friendships and impressions developed while a commissioner is accumulating knowledge for legislative purposes. Nor can a commissioner remain wholly unconscious of the fact that his tenure, unlike that of a federal judge, is not permanent and that the experience he acquires as a commissioner may put him in good position to obtain a lucrative business post when he leaves public service.

[19] James M. Landis, "Meddling From the White House," *New York Herald Tribune*, March 20, 1958.

Proposals for New Agency Safeguards

PAST PLANS for improving regulation by commission have often proposed reorganizing the regulatory agencies into separate legislative and judicial sections—the former staffed with persons responsible to a departmental secretary and through him to the President, the latter with persons appointed for long, staggered terms and charged with a minimum of rule-making. The President's Committee on Administrative Management asserted in 1937 that "the division of work between the two sections would be relatively simple," though it recognized that adjustments would be needed to meet requirements of particular commissions.

Experts have not agreed, however, on where to draw the line between legislative and judicial activity. Many have said that the vast bulk of commission work violates the principle of separation of powers and is, in fact, mixed in character. Efforts to overhaul the commission system have been hindered by differences in approach, tradition, and function among the several commissions. They have been impeded also by the fact that interest in regulatory affairs usually is provoked by allegedly improper performance of either legislative or judicial duties, but seldom of both simultaneously. Accordingly, reform proposals have tended to be weighted toward improvement in one area while neglecting the other.

Bills to Insulate Commissions From Pressures

Virtually all of the reform proposals now pending in Congress are products of displeasure with adjudicative operations of the commissions and hence seek to enhance the independence of the agencies. They are based on the assumption that the commissions, though not courts of law, should have a large measure of the protections surrounding the judiciary.

Sen. William Proxmire (D-Wis.) introduced a bill on Feb. 19 to tighten existing laws against offering or accepting bribes by making it no longer necessary to prove an intent to do wrong. Pointing up the need for "absolute integrity," Proxmire told the Senate that "The present lack of such standards imposes the risk of penalty upon those

who voluntarily subscribe to high ethical standards in their relations with government officials." Rep. Wolverton a week later introduced a bill, applying exclusively to the Big Six, which would impose criminal penalties on any person convicted of attempting to influence "any vote or decision . . . of a quasi-judicial character," if that person had "any pecuniary interest" in the matter or was acting upon behalf of any person who had such an interest.

Following hearings last year into alleged leaks within the C.A.B., Sen. Henry M. Jackson (D-Wash.) introduced a bill which would make it unlawful for any person to make any presentation intended to influence the decision of a quasi-judicial body on the merits of a matter under adjudication until all parties in interest had been notified of their right and given opportunity to participate. Testifying in support of the bill before a Senate Judiciary subcommittee on March 5, 1958, Sen. Jackson explained: "The proposed legislation would give litigants an opportunity to have their cases decided in the same kind of climate of impartiality that exists in a court of law." Jackson noted also that during the 1957 hearings all of the agencies "with the possible exception of the F.C.C." subscribed to the intent of the legislation.[20]

Bernard Schwartz, addressing the Overseas Press Club in New York on March 7, a month after his dismissal as chief counsel of the Subcommittee on Legislative Oversight, suggested a slightly different approach. He recommended enactment of a law to require all persons dealing with federal commissions to register as lobbyists. Schwartz urged also that qualified organizations be asked to pass on the qualifications of prospective appointees to the regulatory agencies. The American Bar Association has long performed this service in the case of federal judicial appointments.

Possibilities for Corrective Action From Within

There seems to be growing realization that Congress knows about all it needs to know to correct lax agency conduct. Most of the improprieties currently being turned up by House investigators follow patterns long known to

[20] When the then chairman of the F.C.C., George C. McConnaughey, was asked his views, he replied: "Mr. Chairman, the commission asked me to state to you that as far as our agency is concerned, in the light of our experience, we do not need it. However, we have no objection to it if the Congress of the U.S., in the over-all picture, believes that there should be such legislation."

exist. A Senate subcommittee studying problems of ethics in government in 1951 foresaw virtually all of the pitfalls into which government officials can slip—and into which some commissioners have apparently stumbled—and came up with most of the remedial proposals now being put forward.[21] Most observers agree that measures to improve F.C.C. operations and to spell out ethical codes applying to the adjudicatory proceedings of all commissions stand the best chance of enactment now.

Public airing of gross instances of improper conduct usually produces corrective action from within, and it is probable that that will be the case again. Some members of Congress have made it plain that the commissions themselves could act to curb improper pressures. In a letter published by the *New York Times* on Feb. 24 Rep. Stewart L. Udall (D-Ariz.) urged that the agencies use their rule-making authority to that end:

> As a starter, the commissioners might: 1) prescribe that all communications to individual commissioners concerning applications be made part of the public file; 2) limit inquiries from members of the legislative and executive departments to requests for status reports . . . ; 3) declare all other forms of intervention improper.

Udall believed that members of Congress would welcome such rules and that codes of conduct would help the commissions to "win and keep public esteem."

Whatever is done, by Congress or by the commissioners, to improve the ethical atmosphere in which the commissions operate, an observation made by the Senate subcommittee in 1951 probably still holds good: "Although the apparent inability of the government to establish independent regulatory agencies which maintain their original direction and momentum has its ethical aspect, the subcommittee believes that defects in organic structure are at the root of it. Probably a radical remedy (in the medical sense) is required."

[21] See "Ethics in Government," *E.R.R.*, 1951 Vol. II, p. 831.